AMEER ALI MOHAMED YUSOFF & ANOR.

v.

SHARIFAH SAIDAH TAN SRI SYED NASIR & ANOR.

HIGH COURT MALAYA, KUALA LUMPUR
SITI NORMA YAAKOB J
[CIVIL SUIT NO. F 106 OF 1982]
18 MARCH 1985

CONTRACT: *Sale and purchase of restaurant as a going business concern - Part payment made - Whether there is an oral contract for the sale and purchase - Repudiation of contract - Whether party not in breach can insist on performance of the contract.*

EVIDENCE*: Failure to call 2nd plaintiff as witness - Whether any adverse inference.*

This is a claim for the balance of the purchase price of a restaurant which the plaintiffs claim had been sold by them to the defendants. The claim is resisted on the ground that there was no concluded agreement reached on the sale or alternatively, the defendants have also pleaded that even if there was such an agreement, it has become null and void when they discovered that the plaintiffs had falsely represented to them that the permanent fixtures and fittings in the restaurant belong to them when in fact they do not. The defendants therefore counterclaim for the refund of all part-payments made by them to the plaintiffs.

The defendants contended that the failure of the plaintiffs to call the 2nd plaintiff as a witness should be interpreted adversely against them. The defendants also contended that the failure of the plaintiffs to sue the defendants' other partner (one Woo Yoh Ling) had the effect of altering the nature of the plaintiff' claim.

Held:

[1] The 2nd plaintiff did not take active part in the negotiation of the sale. It is quite common for a partnership to exist, where a partner does not take any active role in the running of the business but merely lends his name as a "sleeping" partner. Therefore, there is nothing adverse or sinister in the absence of the 2nd plaintiff as a witness in the suit.

[2] The failure to cite Woo as a co-defendant cannot materially affect or alter the nature of the plaintiffs' claim as negotiations for the sale of the restaurant were in fact conducted directly with the defendants in their personal capacities and not as a partnership firm. The fact that the defendants' business was to be managed by a partnership of 3 people is only the defendants' administrative arrangement which is in no way relevant to the plaintiffs or for deciding the issues in this case. The defendants are being sued in their personal capacities and they can't rely on a partnership firm to absolve their liability if any.

[3] When the parties went to the defendants' solicitors to give instructions for the drawing up of the assignment, the transaction for the sale of the restaurant as a going concern was already partially performed as part-payment had already been made. What remained to be done was the drawing up and the execution of the assignment.

[4] The 2nd defendant had discovered from his Manager in November 1979 that the permanent fittings and fixtures did not belong to the plaintiffs but to the principal tenant of the premises. The defendants' feeling of being cheated does not confirm with a payment made by them even after such knowledge. Furthermore, a list of the same fittings and fixtures was included in the Tenancy Agreement. The 2nd defendant had chosen not to read it. There is also no reason for the 1st plaintiff to have assumed ownership as they do not belong to him in the first place.

[5] When a party repudiates a contract, the other party can either accept such repudiation or refuse to accept it and treats the contract as still subsisting but sues the other party who is in breach of the agreement. The plaintiffs had clearly refused to accept the defendants' repudiation of the oral agreement. Therefore, judgement is entered for the plaintiffs for the balance of the purchase price together with interest thereon.

[Judgment for plaintiffs with costs. Counterclaim dismissed with costs.]

For the plaintiffs - P. Vijandran
For the defendants - Dennis Xavier

JUDGMENT

Siti Norma Yaakob J:

This is a claim for RM63,350.80 being the balance of the purchase price of a restaurant which the plaintiffs claim have been sold by them to the defendants. The claim is resisted on the ground that there was no concluded agreement reached on the sale or alternatively, the defendants have also pleaded that even if there was such an agreement, it has since become null and void when they discovered that the plaintiffs had falsely represented to them that the permanent fixtures and fittings in the restaurant belong to them when in fact they do not. Since they, the defendants, have repudiated the contract, they also filed a counterclaim to seek the refund of the sum of RM41,070 which they had paid to the plaintiffs pursuant to the agreement.

Hayat Restaurant started business on 1 August 1978, by a partnership of the first and second plaintiffs with the first plaintiff more actively involved in the management and running of the business than the second plaintiff, his wife. After having managed the business for about a year, the plaintiffs decided to sell it as a going concern to the defendants, a husband and wife who were embarking in the food business for the first time. Negotiations as to the terms of the sale were conducted between the first plaintiff and the first defendant, the second defendant playing only a supportive role in this matter. By the end of August 1979, the terms of the sale were agreed upon and these were to be reduced into writing not as a sale and purchase agreement but to be incorporated into a Deed of Assignment as the premises on which the business was conducted did not belong to the plaintiffs. It was sub-letted to them by the principal tenant, Syarikat Auto Accessories Sdn. Bhd., at a rental of RM3,000 per month and at the end of August 1979, the lease had 2 more years to run with an option for an extension for another 2 years.

The purchase price for the restaurant, furniture, fittings, equipment and plants that belong to the plaintiffs was agreed at RM85,000 and together with the stock-in-trade valued at RM8,350, the total purchase price came to RM93,350.80. This sum was to have been paid by the defendants in the following manner:

(1) RM30,000 on the handing over of the business.

(2) RM15,000 by the end of October 1979.

(3) RM8,350 by the end of November 1979.

(4) RM20,000 by the end of December 1979.

(5) RM20,000 by the end of February 1980.

Sometime in the middle of September 1979, the defendants paid RM10,000 to the plaintiffs and on 7 October 1979, the defendants took over the restaurant as is evidenced by AB25 wherein they also acknowledged receipt of the keys and from that date onwards, they managed the business as their own. On 9 October 1979, the first defendant received from the first plaintiff 11 different sets of documents as listed in AB26 and these include,

(1) the tenancy agreement entered into by the first plaintiff with Syarikat Auto Accessories Sdn. Bhd., AB1-12.

(2) the business registration of Hayat Restaurant, AB13-15.

(3) the insurance policy, and

(4) various deposit receipts, some of which were for utilities, the deposits for which were made by the first plaintiff and for which the defendants agreed to take over by refunding him the various deposits totalling RM11,070. This refund was duly made by the defendants on 25 October 1979 and this amount was paid over and above the purchase price.

On 23 October 1979, the first plaintiff received a second payment of RM20,000 from the defendants and this payment was made by a cheque issued by the first defendant's solicitor, Messrs. Zain & Co. Thus, on 25 October 1979, the defendants made 3 payments to the plaintiffs altogether, RM10,000 sometime in the middle of September 1979, RM20,000 on 23 October 1979 and RM11,070 on 25 October 1979.

Then on 25 November 1979, the first plaintiff received a cheque for RM15,000 AB33, from the defendants but when he banked it a week later on 2 December 1979, the cheque was returned with payment stopped. When he complained about this to the first defendant, she promised to make good the cheque by replacing it together with the next instalment payment of RM20,000 which was due by the end of December 1979. On 25 or 26 December 1979, the first plaintiff received a post-dated cheque for RM35,000, AB33, from the first defendant, but when he presented it for payment on 2 January 1980, the cheque was returned with a note "refer to drawer". AB54. The first plaintiff complained to the first defendant who asked him to present it again for payment in 2 weeks time and when the first plaintiff did so on 19 January 1980, it was again dishonoured, AB55. Various attempts made by the first plaintiff after that, both orally and in writing to get the defendants to make good the dishonoured cheque for RM35,000 as well as pay the balance of the purchase price of the restaurant met with no success whatsoever and the plaintiffs eventually, on 24 May 1980, filed the present action.

From the outset it must be stressed that the plaintiffs rely on the alleged oral agreement made with the defendants for the sale of the restaurant and not on the Deed of Assignment which appears as an unexecuted document at AB16-24. For this very reason, there is no merit in the defendants' argument that there had been a novation of the oral agreement, assuming that there had been one, when it was reduced into writing in the Deed of Assignment, which also involved another party, the defendants' partner, Woo Yoh Ling. Whether the plaintiffs succeed on their claim depend on whether there are sufficient evidence to prove that the oral agreement had been concluded by the time the first instalment payment of the purchase price was made. However, before I deal with the evidence, there are 2 minor objections which I wish to get out of the way. One of these is the defendants' contention that the failure of the plaintiffs to call the second plaintiff as a witness should be interpreted adversely against them. The other is the plaintiffs' failure to sue Woo Yoh Ling, the defendants' partner and it is submitted that this omission had the effect of altering the nature of the plaintiffs' claim.

The first plaintiff had testified that although his wife, the second plaintiff, was present during the negotiations over the sale when that were conducted in his house, she never took any active role, her presence was only necessary as being the wife of the first plaintiff she had to serve drinks to their guests, the first and the second defendants. The second defendant, a Jordanian by origin, also confirmed that when the second plaintiff was present, she only spoke Bahasa to his wife, the first defendant and since he could not understand Bahasa, he did not know what the 2 women were conversing about. As it is quite common for a partnership to exist, where a partner does not take any active role in the running of the business but merely lends his name as a "sleeping" partner, in all probability, this could well have happened in the business partnership of the first and the second plaintiffs and I therefore do not consider anything adverse or sinister in the absence of the second plaintiff as a witness in this suit.

The existence of Woo Yoh Ling, the defendants' other partner who hails from Singapore only came to light when he issued the post-dated cheque for RM35,000 (AB53) and to whom the first plaintiff communicated at AB57 when the first defendant failed to replace the bounced cheque. There is no evidence that prior to 26 December 1979 when the bounced cheque was handed to the first plaintiff, he, the first plaintiff had been made aware of Woo's presence or his position with the defendants. I do not see how the failure to cite Woo as a co-defendant in this suit can materially effect or alter the nature of the plaintiffs' claim as negotiations for the sale of the restaurant were in fact conducted directly with the defendants in their personal capacities and not as a partnership firm. The fact that the defendants' business was to be managed by a partnership of 3 people is only the defendants' administrative arrangement which is in no way relevant to the plaintiffs or for deciding the issues in this case. The defendants are being sued in their personal capacities and they cannot rely on a partnership firm to absolve their liability, if any.

I now come to consider the more substantive objection whether there is a valid and concluded oral agreement between the parties for the sale of the restaurant and for this, I only need to look at the conduct of the parties as presented by the evidence. It is not disputed that in the beginning, at least from August until the end of October 1979, relationship between the parties was most cordial and friendly. There was evidence that prior to the negotiations leading to the sale of the restaurant, the first plaintiff has had some business dealing with the second defendant when the former purchased some precious stones from the latter. There was mutual respect and trust from both sides and it was under these circumstances that the defendants paid RM30,000 to the plaintiffs, RM10,000 sometime in the middle of September 1979, and RM20,000 on 23 October 1979. Now what do these payments represent? Are they to be regarded as refundable deposits as the defendants made them to be or the first of the instalment payments towards the purchase price of the restaurant as the plaintiffs maintain they were, in which case, the parties had already agreed on the terms of the sale. The answer to this can be found in AB46-49, a letter from Zain & Co., the first defendant's solicitors to whom she had brought the first plaintiff to give instructions for the drawing up of the assignment. DW1 who wrote the letter had stated in AB46 that when the first plaintiff and the first defendant saw him in his office in late September 1979, the transaction for the sale of the restaurant as a going concern was already partially performed as the first defendant had already paid the first plaintiff RM10,000 and the purchase price excluding the stock-in-trade agreed at RM85,000. From this letter, it is also clear that what remains to be done was the drawing up and the execution of the Deed of Assignment which is a separate arrangement altogether, independent of the oral agreement to which the plaintiffs rely. Thus,

the payment of RM30,000 can only mean the first instalment payment of the purchase price which the defendants had undertaken to pay upon the handing over of the business which was done on 7 October 1979. This is further strengthened by the fact that there was no denial, both in the pleadings and in evidence, of the arrangement as to the instalment payments of the purchase price that was to be made by the defendants.

AB46-49 is dated 17 December 1979 but at AB49, DW1 has stated that the first defendant had told him that the 3 copies of the Deed of Assignment had already been signed and posted to him but was lost in the post. From this I can only conclude that AB16-24, the unexecuted Deed of Assignment was not the first set of documents prepared by Zain & Co. as the original set was lost in the post. AB49 speaks of "3 copies of the signed Assignment" and here again I cannot but wonder whether the second defendant was one of the signatories, the only person who refused to sign at AB23 of the unexecuted Deed of Assignment.

This brings me to consider what had prompted the second defendant to refuse signing the Deed of Assignment. His explanation was that he was not supplied with the First Schedule as specified in AB19 of the Deed of Assignment which would have listed all the trade fittings, fixtures, plants and equipment which make up the purchase price of RM85,000. Moreover, he had also discovered from his Manager in November 1979 that the permanent fittings and fixtures did not belong to the plaintiffs but to the principal tenant, Syarikat Auto Accessories Sdn. Bhd. Here I pause to consider that as the defendants had felt they had been cheated by the plaintiffs, their feelings do not confirm with the action of the first defendant in parting with the RM35,000 cheque to the first plaintiff on 26 December 1979 and with the first plaintiff's action in presenting the cheque twice for payments.

Coming back to the absence of the First Schedule in the Deed of Assignment, this is not pleaded by the defendants as one of the reasons why they had treated the oral agreement as being null and void. However, as it was brought up during the trial, I only need to allude to it by stating that the First Schedule can only mean the trade fittings and fixtures, plants and equipment which belong to the plaintiffs and which make up part of the purchase price of the restaurant. The First Schedule is again spelt out in Clause 9(i) and 10 of the Deed of Assignment at AB21 and 22 and Clause 10 particularly mentions the fact that the defendants had inspected the premises and this was so confirmed by the second defendant when he testified that he had inspected the premises together with his wife, the first defendant and they must have been satisfied with their inspection to warrant them making various payments to the plaintiff. Anyway, I do not see how the absence of the First Schedule can absolve the defendants of their obligations as this claim was not based on the Deed of Assignment but on the oral agreement.

Now I come to consider whether there is any evidence to establish that the 1st plaintiff had declared to the defendants that the permanent fittings and fixtures belong to him. These permanent fittings and fixtures as listed in para. 8(a) of the defendants' Amended Statement of Defence are the same as that listed in AB12 attached to the Tenancy Agreement. It is not disputed that the first defendant received a copy of the Tenancy Agreement, AB1-12 on 9 October 1979 before she signed the Deed of Assignment. However, she admitted that she did not read the contents of the Tenancy Agreement but merely relied on what the first plaintiff had told her about it. The second defendant on the other hand gave contrary evidence regarding the Tenancy Agreement. At first he admitted that he had read the Agreement and found certain pages missing, one of which was AB12 that list out all the

permanent fittings and fixtures belonging to the principal tenant. When cross-examined, he changed his story and denied that he had ever read it or that his wife had even shown it to him. In this respect, I cannot rely on his evidence and I hold that AB12 was attached to the Tenancy Agreement when it was handed to the first defendant and if she chose not to read it or decided that it did not mean what it purports to state then she cannot complain that she did not get good notice of it. Thus as at 9 October 1979, she must be presumed to have been aware that the permanent fixtures and fittings belonged to the principal tenant and not to the first plaintiff. There is no reason for the first plaintiff to have assumed ownership as they do not belong to him in the first place. Moreover title to the permanent fixtures and fittings is not only declared at AB12 but also at the third para. of AB1 and again in Clause 1 of the Deed of Assignment.

From the evidence, it is also clear that from 7 October 1979, when the defendants took over the business, until 5 May 1980, when the first defendant wrote AB66, the defendants were running the business at a loss and were finding it difficult to make payments of the rentals due which the first defendant attribute solely to bad luck and bad business and this I consider is the main reason why the defendants are now trying to get out of their obligations. There is also mention of "new" terms of payment in AB39, a letter written by Zain & Co., solicitors for the first defendant and this can only refer to the payments to the balance of the purchase price and the inability of the defendants to meet such payments.

Lastly, I come to the defendants' contention that pursuant to Clause 5(ii) of the Deed of Assignment, the plaintiffs can only enforce the oral agreement by taking possession of the restaurant for which they had been willing all along, to hand back the keys to the first plaintiff and by forfeiting the RM41,070. The rule of law is that when a party repudiates a contract, which the defendants had done in this case, the other party can either accept such repudiation or refuse to accept it in which case, treats the contract as still subsisting but sues the other party who is in breach of the agreement. The plaintiffs had clearly refused to accept the defendants' repudiation of the oral agreement and had all along maintained that the oral agreement as subsisting and that the defendants were in breach of it and as such, reliance on Clause 5(ii) of the Deed of Assignment is irrelevant.

From the evidence, both oral and documentary, I hold that a concluded oral agreement had been made by the parties on the sale of the restaurant as early as middle of September 1979, if not earlier, when the defendants made the first payment of RM10,000 and for that very reason, the defendants cannot possibly succeed on their counterclaim as the amounts claimed represent the sum paid by them pursuant to the oral agreement. As the amount of the plaintiffs' claim is not disputed, judgment is entered for the plaintiffs in the sum of RM63,350.80 being the balance of the purchase price of the restaurant, interest at 6% per annum from 30 October 1979, until date of realization and costs and the counterclaim is dismissed with costs.

Also found at [1985] 2 CLJ 465